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In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDDIE J. BOOKER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Petitioner,

v.

DUCAN FANFAN,
Respondent.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* THE UNITED STATES SENTENCING COMMISSION IN SUPPORT OF PETITIONER, UNITED STATES OF AMERICA

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INTEREST OF AMICUS CURIAE

The United States Sentencing Commission (the "Commission") is an "independent commission in the judicial branch of the United States" with the power to issue, review and revise sentencing guidelines in order to standardize the sentencing decisions of the federal courts within the prescribed statutory maximum sentence set by Congress. 28 U.S.C. §§ 991(a), 994(b)(1). Promulgation of the United States Sentencing Guidelines (the "Guidelines") represents the Commission's principal work. Accordingly, the Commission has a direct interest in the constitutionality of sentences issued under those Guidelines. For this reason, the Commission also appeared before the Court as amicus curiae in *Mistretta v. United States*, 488 U.S. 361 (1989), this Court's decision upholding the constitutionality of the Guidelines. The parties have consented to the Commission's submission of this brief.[1]

INTRODUCTORY STATEMENT

The central question before the Court is whether the imposition of a Guidelines sentence based on a determination of fact that is neither found by a jury nor admitted by a defendant violates the Sixth Amendment to the United States Constitution. The answer to this question is categorically no. As this Court has recognized repeatedly,

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, the Commission states that no counsel for any other party authored any part of this brief, and no person or entity, other than the Commission and its counsel, made a monetary contribution to the preparation or submission of this brief.

the Guidelines do not establish the prescribed statutory maximum for any criminal offense. Rather, unlike the sentencing system at issue in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the Guidelines serve only to cabin judicial discretion within the statutory parameters that Congress has established for federal crimes. Accordingly, this Court has consistently upheld the constitutionality of the Guidelines, and should continue to do so in the context of the instant case.

A. Historical Inequities In Sentencing Prompted Passage Of The Act Establishing The Federal Sentencing Guidelines

In 1984, Congress enacted the Sentencing Reform Act (the "Act") in response to an emerging consensus that the Federal sentencing system was seriously broken and in need of major repair. *See* S. Rep. No. 97–307, at 956 (1981) ("glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence"). The primary problem that Congress sought to address was the grave inequity in sentencing attributable to the unfettered discretion that courts traditionally exercised in the context of an indeterminate sentencing system. *See* H.R. Rep. No. 98–1017, at 34 (1984) ("The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences").

Indeed, for more than a century, Congress afforded judges virtually unlimited authority to fashion appropriate sentences within broad statutorily prescribed ranges. *See* Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining*, Vol. I

(December 1991) [hereinafter Commission, *1991 Report*] at 9. During that time, judges "decided the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence." Commission, *1991 Report*, at 9. Because each judge was "left to apply his own notions of the purposes of sentencing," the result was "an unjustifiably wide range of sentences to offenders . . . convicted of similar crimes." S. Rep. 98–225, at 38 (1984). The parole system, which applied to only a portion of those sentenced and which permitted the release of prisoners based upon inconsistent ideas regarding the potential for rehabilitation, exacerbated this lack of uniformity. Commission, *1991 Report*, at 9 (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

B. The Act And The Guidelines Sought To Channel Courts' Traditional Discretion To Impose Sentences Within The Prescribed Statutory Maximum

With its enactment of the Act, Congress intended to revise the federal sentencing process in a manner that would eliminate the unwarranted disparities and lack of uniformity in sentencing. As an initial matter, the Act explicitly established the only permissible goals of federal sentencing.[2] The Act also created the Commission, an agency dedicated

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[2] Congress decided that sentencing should be tailored "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner." *See* 18 U.S.C. § 3553(a)(2).

to establishing sentencing policies and practices; placed it within the Judicial Branch; and directed it to promulgate guidelines to be used for sentencing within the prescribed statutory maximum.[3] Finally, the Act authorized limited appellate review of a guideline sentence, *see* 18 U.S.C. § 3742(a), (b) (permitting a defendant to appeal a sentence above the defined range and the government to appeal a sentence falling below that range), and abolished federal parole, *see* 18 U.S.C. § 3624(a), (b). In so doing, Congress effectively consolidated in the Commission the power previously exercised by individual sentencing judges and the Parole Commission. *See* 28 U.S.C. §§ 991, 994, 995(a)(1).

(i) Congress Placed The Commission Within The Judicial Branch So That The Judiciary Would Retain Its Traditional Sentencing Function

Because Congress concluded that "sentencing should remain primarily a judicial function," S. Rep. No. 98–225, at 159, it established the Commission "as an independent commission in the judicial branch of the United States," 28 U.S.C. § 991 (a). The Act provides that the Commission is to be comprised of seven voting members (including the Chair) appointed by the President "by and with the advice

[3] Significantly, although Congress ordered the courts to follow the guidelines that the Commission was authorized to promulgate, the Act preserved judges' discretion to depart from a prescribed guideline in a particular case if the judge found an important aggravating or mitigating factor present that the Commission did not adequately consider when formulating the Guidelines. *See* 18 U.S.C. § 3553(a), (b). The Act also required courts to state their reasons for the sentences imposed and to articulate "the specific reason" for imposing sentences different from those described in a particular guideline. *See* 18 U.S.C. § 3553(c).

and consent of the Senate." *See* 28 U.S.C. § 991. Moreover, the Act establishes that "three of the [Commission's] members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States,"[4] and that no more than four members of the Commission can be members of the same political party. *Id.* (The Attorney General, or his designee, and the Chair of the Parole Commission are designated as *ex officio,* non-voting members.) Thus, the composition of the Commission itself, as designated in the Act, reinforces Congress' intent that sentencing remain a distinctly judicial undertaking.

(ii) The Act Directed The Commission To Establish Guidelines Consistent With The Maximum Sentences Fixed By Law

In the Act, Congress directed the Commission to create the Guidelines with three goals in mind. First, the Commission was to "assure the meeting of the purposes of sentencing," as set forth in 18 U.S.C. § 3553(a)(2). *See* 28 U.S.C. § 991(b)(1)(A). Second, the Commission was to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into

[4] Although "at least three" commissioners were to be federal judges in the Act as it was originally enacted, the Prosecutorial Remedies and Other Tools To End The Exploitation of Children Today (PROTECT) Act of 2003 amended 28 U.S.C. § 991(1) to limit to "no more than three" the number of judges who may be members of the Commission. *Protect Act*, Pub. L. 108–21, 117 Stat. 650 (2003) (codified at 28 U.S.C. § 991(a)).

account in the establishment of general sentencing practices." *See* 28 U.S.C. § 991(b)(1)(B). Finally, Congress directed the Commission to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." *See* 28 U.S.C. § 991 (b)(1)(C).

To meet these goals, Congress directed the Commission to develop sentencing ranges applicable for specific categories of offenses involving similarly situated defendants. The guidelines were not intended to trump statutory requirements. In fact, Congress required sentencing ranges to be consistent with all pertinent provisions of title 18, United State Code, and *"not include sentences in excess of the statutory maxima."* *Mistretta,* 488 U.S. at 375 (emphasis added); *see also* 28 U.S.C. § 994(b)(1). Congress placed other limitations on the guidelines as well. Congress directed that, "for sentences of imprisonment, 'the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.'" *Mistretta*, 488 U.S. at 375 (quoting 28 U.S.C. § 994(b)(2)).

In establishing a guidelines sentencing system, Congress fully expected "there [would] be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances," including "several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. Rep. No. 98–225, at 168. Congress intended that there "be a complete set of guidelines that covers in one way or another all important variations that commonly may be expected in criminal cases, and that

reliably breaks cases into their relevant components and assures consistent and fair results." *Id.*

Congress further directed the Commission to consider seven factors, all of which were traditionally considered in sentencing, in its formulation of offense categories: 1) the grade of the offense; 2) the aggravating and mitigating circumstances of the crime; 3) the nature and degree of the harm caused by the crime; 4) the community view of the gravity of the offense; 5) the public concern generated by the crime; 6) the deterrent effect that a particular sentence may have on others; and 7) the current incidence of the offense. *See* 28 U.S.C. § 994(c)(1)-(7). Congress also listed eleven additional factors for the Commission to consider in establishing categories of defendants. *See* 28 U.S.C. § 994(d)(1)-(11).[5] Congress further prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders," *see* 28 U.S.C. § 994(d), and instructed that the guidelines should reflect the "general inappropriateness" of considering certain other factors that might serve as proxies

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[5] Again, the legislative history provides additional guidance for the Commission's consideration of these statutory factors. For example, Congress intended that the "criminal history . . . factor[s] include[] not only the number of prior criminal acts – whether or not they resulted in convictions – the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a 'career criminal' or a manager of a criminal enterprise." S. Rep. No. 98–225, at 174. The promulgated guidelines include these and other criminal history measures that necessarily may require judicial factfinding extending beyond the ascertainment of the fact of prior convictions. *See* Commission, *Guidelines Manual, Ch. 4 (2003)* (all Commission Guidelines Manuals are hereinafter referred to as "*Guidelines Manual*").

for forbidden factors, such as current unemployment. *See* 28 U.S.C. § 994(e).

In addition to these constraints, Congress provided for additional considerations for the Commission to adhere to when fulfilling its duties. Congress directed that guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists. *See* 28 U.S.C. § 994(h). Congress further directed the Commission to assure a substantial term of imprisonment for an offense constituting a third felony conviction, for a career felon, for one convicted of a managerial role in a racketeering enterprise, for a crime of violence by an offender on release from a prior felony conviction, and for an offense involving a substantial quantity of narcotics. *See* 28 U.S.C. § 994(i). Congress also enumerated various aggravating and mitigating circumstances to be reflected in the guidelines, such as multiple offenses or substantial assistance to the Government (respectively). *See* 28 U.S.C. § 994(l) and (n).

The Commission has additional duties, that include making recommendations to Congress regarding whether the grades or maximum penalties of offenses should be modified. *See* 28 U.S.C. § 994(r). In fulfilling these duties, the Commission was tasked to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *See* 28 U.S.C. § 994(o). It must also review and revise the Guidelines in consideration of comments and data coming to its attention. *Id.* The Commission must report to Congress any amendments to the guidelines, and must submit to Congress annually an analysis of the operation of the guidelines. *See* 28 U.S.C. § 994(p),(w).

Recognizing that the Guidelines should conform to the needs of the system, the Commission expected that its work on the Guidelines would be evolutionary. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988). The Commission would therefore "issu[e] Guidelines, gathe[r] data from actual practice, analyz[e] the data, and revis[e] the Guidelines over time." *Id.* In support of its monitoring function, the Commission reviews the charging and sentencing documents for approximately 65,000 cases per year. *See* Commission, *2002 Annual Report*, at 40; *Mistretta*, 488 U.S. at 369. This effort enables the Commission to ensure uniformity in federal sentencing. From these cases, the Commission "codes up to 262 pieces of information about each guidelines sentencing that occurs in federal court. The resulting, steadily expanding database is an invaluable source of information for the Commission as it monitors guidelines application and refines the Guidelines Manual." *See* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 65 (1993).[6] As this Court has explained, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial interpretations might suggest." *Braxton v. United States*, 500 U.S. 344, 348 (1991). And the Commission has done exactly that. Since

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[6] The Commission also uses the database to evaluate whether the Guidelines have achieved the goals of the Sentencing Reform Act. To that end, the Commission will be issuing a report reflecting how the Guidelines have met the goals of the Act. *See* Commission, *Fifteen Years of Guideline Sentencing* (forthcoming Fall, 2004).

the promulgation of the original set of Guidelines through the present, the Commission has continuously amended the Guidelines to respond to court decisions, congressional directives, and the Commission's own evaluations of the need for refinements. Indeed, as of the current manual, there have been 662 amendments. *See generally*, *Guidelines Manual*, App. C (2003). These amendments automatically take effect within a 180-day waiting period, unless otherwise modified or disapproved by Act of Congress. *See* 28 U.S.C. § 994(p).[7]

SUMMARY OF THE ARGUMENT

The imposition of a Guidelines sentence based on a judge's determination of a fact neither found by a jury nor admitted by a defendant does not violate the Sixth Amendment to the United States Constitution. It does not do so for two primary reasons.

I. Distinctions between the Guidelines and the Washington sentencing scheme considered in *Blakely* demonstrate that judicial factfinding under the Guidelines does not violate the Sixth Amendment. Unlike the Washington sentencing scheme, the Guidelines do not alter the statutorily prescribed range of penalties to which a criminal defendant is exposed. Instead, the Guidelines assign weights to traditional sentencing factors *within* statutory constraints. In addition, the Washington sentencing scheme invalidated by this Court is statutory, whereas the Guidelines are not purely legislative enactments, further rendering *Blakely* inapplicable to the Guidelines.

[7] This is similar to the rule making process governing the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. *See* 28 U.S.C. § 2074(a).

II. The maximum sentence a federal judge may impose based on a jury verdict or facts admitted by a defendant is the statutory maximum set by Congress in the relevant federal statute. Indeed, under the Act, any additional facts found by a judge at sentencing pursuant to the Guidelines cannot increase a sentence beyond the statutory maximum set by Congress. Thus, because Congress, not the Commission, sets the statutory maximum, *Blakely* is inapplicable to the Guidelines. Similarly, Congress may establish a statutory mandatory minimum sentence that trumps a lower guideline range. Considerable precedent grounded in sound reasoning supports this view.

ARGUMENT

I. CRITICAL DIFFERENCES BETWEEN THE NATURE OF THE GUIDELINES AND THE WASHINGTON STATUTORY SCHEME DEMONSTRATE THAT THE IMPOSITION OF A GUIDELINE SENTENCE DOES NOT VIOLATE THE SIXTH AMENDMENT

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court announced the rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Apprendi* and its progeny, the Court invalidated state statutory sentencing schemes that extended the authority of judges to impose a sentence above a statutory maximum. By contrast, the Guidelines constrain a court's sentencing authority within the boundaries of a legislatively determined maximum penalty, and (where applicable) a mandatory minimum penalty. Consequently, the rule announced in *Apprendi* does not apply to a guideline sentence that falls below the Congressionally prescribed statutory maximum.

An examination of how the Guidelines were crafted highlights the critical distinctions that separate the Guidelines from the state statutory scheme at issue in *Blakely*.

A. The Guidelines Assign Weights To Traditional Sentencing Factors Within Statutory Constraints

In response to the Act, the Commission began the Herculean task of creating a workable guidelines scheme. As it undertook its mission, the Commission was required to "resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations." *See Guidelines Manual*, § 1A1.1, cmt. Intro. and Gen. App. Principles, (A)(4) (2003). Among those questions, the Commission had to decide whether appropriate punishment would be defined primarily on the principles of "just deserts" or "crime control." Consistent with the Act's "rejection of a singly doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing," the Commission did not choose one theory over the other. *See* Commission, *Supplementary Report on Initial Sentencing Guidelines and Policy Statements* (1987) [hereinafter "*Supplementary Report on Initial Guidelines*"] at 16. Instead, the "Guidelines embody aspects of both just desert and crime-control philosophies of sentencing [and] give effect to both considerations." *Id.*[8]

[8] By contrast, the Washington legislature adopted a "just deserts" philosophy of sentencing. David Boerner, *The Role of the Legislature in Guideline Sentencing in the Other Washington*, 28 Wake Forest L. Rev. 381 (1993) (hereinafter *Boerner*); *see also* Wash. Rev. Code Ann. § 9.94A.850 (West 2003).

The Commission's task was compounded by the complexity of the federal criminal code. As noted by Justice Richard H. Poff, a jurist of the Supreme Court of Virginia and a former Vice-Chair of the Brown Commission, the federal system had "innumerable statutes dealing with such basic offenses as theft and fraud" that were "scattered about hither and yon among various titles of the United States Code" resulting in "conflicting court interpretations." Commission, *Preliminary Report to the Congress: Statutory Penalties Project Description and Compilations of Federal Criminal Offenses* (1989), at vi (quoting *Reform of the Federal Criminal Laws, Hearings Before the Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary*).[9] Because the major goal of the Act was to increase uniformity in sentencing, while not sacrificing proportionality, the guidelines had to "authorize appropriately different sentences for criminal conduct of significantly different severity." Commission, *Supplementary Report to the Congress: Statutory Penalty Review Project* (1991), at 13.

As a starting point for the Commission's work, it utilized an empirical approach, examining detailed data from more than 10,000 presentence investigations and less detailed data on nearly 100,000 federal convictions. The Commission also examined the United States Parole Commission's guidelines and resulting statistics, public commentary and information from other relevant sources to determine existing sentencing practices. *See Supplementary*

[9] The first Guidelines manual listed over 700 penal statutes or subsections thereof in Appendix A, *see Guidelines Manual*, App. A (1987), and the current manual references over 1200 different statutes or subsections thereof. *See Guidelines Manual*, App. A (2003).

Report on Initial Guidelines, at 16. "This approach provided a concrete starting point and identified a list of relevant distinctions that, although of considerable length, [was] still short enough to create a manageable set of guidelines." *Id.* From these distinctions, the Commission was able to create a sentencing guidelines scheme that was not too complex to be workable, but not so simple that it overlooked harms that resulted from the defendant's criminal conduct. *See Guidelines Manual* § 1A1.1, cmt. Intro. and Gen. Principles, (A)(3) (2003).

Importantly, the Commission examined existing state guidelines systems, including the Washington system at issue in *Blakely*. *Supplementary Report on Initial Guidelines*, at 14. The Commission rejected the approach used by many states, concluding that "[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal crimes.." *Id.* For example, under many states' systems, "a single category of robbery . . . lumped together armed and unarmed robberies, robberies with and without injuries, [and] robberies of a few dollars and robberies of millions," and thus "would have been far too simplistic to achieve just and effective [federal] sentences, especially given the narrowness of the permissible sentencing ranges." *Supplementary Report on Initial Guidelines*, at 13. Consequently, the Commission determined that the Guidelines should be descriptive of generic conduct, rather than track statutory language. *See Guidelines Manual* § 1A1.1, cmt. Intro. and Gen. App. Principles, (A)(4)(a) (2003).

Further, consistent with the past sentencing practices of judges and the Parole Commission, the Commission decided to create a system requiring a court to consider, within constraints, a defendant's "real" offense conduct. In

creating the Guidelines, the Commission conducted a study of past sentencing practices and arrived at a list of relevant factors that courts traditionally employed to arrive at a sentence in the indeterminate scheme. The Commission then assigned "weights" to these factors, thereby guiding courts' discretion in how each factor would impact the calculation of the sentence. Significantly, while the Commission's list of factors included elements of the offense, it also included harms associated with the crime. Just as they had always done, courts could therefore consider a number of important, commonly occurring, real offense harms, while preventing prosecutors from influencing sentences by increasing or decreasing the number of counts in an indictment. *See Guidelines Manual* § 1A1.1, cmt. Intro. and Gen. App. Principles (A)(4)(a) (2003). The factors incorporated by the Commission into the Guidelines consisted of factors that have traditionally been considered appropriate sentencing factors under indeterminate sentencing systems. *See Blakely*, 124 S.Ct. at 2540 ("Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion."); *see also* 18 U.S.C. § 3661.

B. The Guidelines Cabin Judicial Discretion Within Statutory Limitations

The operation of the Guidelines has always been constrained by the statutorily imposed sentencing limits, both minimum and maximum. This principle, enunciated by Congress in title 28, section 994(b)(1) of the U.S. Code, is incorporated in *Guidelines Manual* § 5G1.1. *See Guidelines Manual*, § 5G1.1 (2003). The impact of the statutory maxima on guideline sentences is especially critical given the broad range of maxima reflected in the United States Code. For example, the federal fraud statutes directed to

§ 2B1.1 of the *Guidelines Manual* include maxima as low as one year (*see, e.g.*, 18 U.S.C. § 1003) and as high as thirty years (*see, e.g.*, 18 U.S.C. § 1344). *See Guidelines Manual*, § 2B1.1 (2003). The Guidelines computation for a conviction under either of these fraud statutes results from the compilation of a base offense level that is applicable to fraud offenses generally and myriad other factors depending on the manner in which the crime was committed. As the offense level increases based on traditional discretionary factors, so will the applicable Guidelines range. The Guidelines, however, make clear that a defendant will be subjected to no more than the maximum statutory penalty set by Congress for the offense of conviction.

C. The Washington State Legislature Devised And Maintained The Sentencing System At Issue In *Blakely*

Washington state's sentencing scheme is fundamentally different from the Guidelines. The Washington state sentencing commission is an agent of the legislature, not part of the judicial branch. Unlike the Commission, the Washington commission cannot promulgate guidelines that become automatically effective. Rather, it proposes guidelines, that the legislature must affirmatively enact. *See*, Wash. Rev. Code Ann. § 9.94A.850 (West 2003); *Boerner*, at 387. Thus, the Washington guidelines scheme is purely statutory, and the state courts therefore have little, if any, influence over sentencing policies. *See State v. Ammons*, 713 P.2d 719, 723 (Wash. 1986) (*en banc*) ("The trial court's discretion in sentencing is that which is given by the Legislature"); *State v. Freitag*, 896 P.2d 1254, 1256 (Wash. 1995) (*en banc*) ("[I]t is the function of the judiciary to impose sentences consistent with legislative enactments.").

The Washington legislature rejected an approach utilizing "real harms" and tied the presumptive range solely to the offense of conviction and prior criminal history. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Justice 71, 88 (M. Tonry, ed. 2001); *see also* Wash. Rev. Code Ann. § 9.94A.510 (West 2003). Under the Washington scheme, the legislature assigned each penal offense a seriousness level that is a function of the statute of conviction. *See* Wash. Rev. Code Ann. § 9.94A.520 (West 2003). The current statute setting forth seriousness levels for the Washington penal statutes lists approximately 174 offenses. *See* Wash. Rev. Code Ann. § 9.94A.515 (West 2003). The legislature directed that the offense seriousness levels rank property crimes in the lower levels and crimes against persons in the upper levels. *Boerner*, at 390. With notable exceptions (*e.g.*, use of a firearm), harms associated with the crime of conviction do not impact the sentence. As such, any defendant convicted of a particular crime will be assigned the same severity level as any other defendant convicted of the same crime.

The Washington Sentencing Reform Act (the "Washington Act") requires the judge to impose a sentence within the presumptive range, absent extraordinary circumstances. *See* Wash. Rev. Code Ann. § 9.94A.505 (West 2003). That range, and not the broader statutory maximum for the class of felony committed, is always applied unless the court finds that there exists "substantial and compelling reasons justifying an exceptional sentence." *See* Wash. Rev. Code Ann. §9.94A.535 (West 2003). A factor is a permissible reason for imposing an exceptional sentence only if it is not already taken into account in the calculation of the presumptive range. Moreover, "[f]acts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided

for in RCW 9.94A.535(2)(d), (e), (g), and (h)." Wash. Rev. Code Ann. § 9.94A.530 (2) (West 2003).

In *Blakely*, Petitioner pled guilty to second-degree kidnaping involving domestic violence and use of a firearm, a class B felony, and entered a guilty plea admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts. *Blakely*, 124 S.Ct. at 2534-35. A Washington state statute provided "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." *Id.* at 2535. However, the Washington Act further limited the range of sentences a judge could impose. For petitioner's offense of second-degree kidnaping with a firearm, the Act provided for a statutory "standard range" of 49 to 53 months. *Id.* at 2535 (citing Washington Act § 9.94A.320). The Washington Act permitted the court to impose a sentence above the standard range if it found "substantial and compelling reasons justifying an exceptional sentence." *Id.* (citing Washington Act § 9.94A.120(2)). Pursuant to this enhancement section, and after hearing a description of the kidnaping, the judge found that Petitioner had acted with deliberate cruelty and imposed an "exceptional sentence of 90 months – 37 months beyond the standard maximum." *Id.* Significantly, under Washington state law, "deliberate cruelty" is identified as an element of a more serious offense. *See* Wash. Rev. Code Ann. § 9.94A.530 (2) (West 2003). Thus, the enhancement mechanism in operation under state law allowed the court to penalize Blakely for the commission of an aggravated offense. *See Blakely*, 124 S. Ct. at 2539 ("Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense."). In other words, by extending the court's discretion to enable it to find facts that are elements of other offenses, state law

allowed "judicial impingement upon the traditional role of the jury . . . ." *id.*, at 2540, thereby violating the *Apprendi* rule. By contrast, the Guidelines operate not to extend, but rather to constrain, the court's discretion.

Blakely did not conclude that the source of the "statutory maximum" is irrelevant. That the Guidelines are not statutes *is* relevant. *See United States v. Booker*, 375 F.3d 508, 519-20 (7th Cir. 2004) (Easterbrook, J., dissenting). "Statutory" in the phrase "statutory maximum" is not "an inept shorthand." *Id.* at 519. Because Congress sets the maximum and minimum penalties for federal crimes in the relevant statutes as explained below, and such penalties are not set in the Guidelines, a jury verdict or guilty plea authorizes any sentence up to the statutory maximum and above the statutory minimum. *Id.* Consequently, what happens after the jury verdict or plea "is unrelated to the sixth amendment" and thus, "the rule of *Apprendi* and *Blakely* is confined to statutes." *Id.* That the Washington sentencing scheme is statutory is therefore a constitutionally significant distinction between the Guidelines and the Washington scheme.

II. THE STATUTORY PENALTY SET BY CONGRESS FOR A FEDERAL CRIME, AND NOT THE SENTENCING GUIDELINE RANGE, ESTABLISHES THE PRESCRIBED STATUTORY MAXIMUM FOR SIXTH AMENDMENT PURPOSES

A. The Guidelines Do Not Establish The Statutory Maximum Penalty For Any Criminal Offense

The Commission is not authorized to establish statutory maximum penalties; rather, when creating the

Commission and delegating powers to it, Congress clearly manifested its intent to reserve the power to set maximum penalties. It established that the Commission may only recommend to Congress whether maximum penalties should be modified. *See* 28 U.S.C. § 994(r). The legislative history supports this view. Indeed, the Senate Committee on the Judiciary indicated that the Committee believed that the Commission would be in a particularly good position to make such recommendations to the Congress. *Senate Report*, No. 98–225, at 179.

The Guidelines themselves further bolster the understanding that the Commission's role is limited. As amended, the Guidelines are replete with examples of the controlling impact of congressional changes to statutory penalties on Guideline sentencing ranges. *See, e.g.*, *Guidelines Manual*, App. C (2003) Amend. 95 (amending section to "reflect increased maximum sentences for certain conduct covered by this guideline"); Amend. 139 (reflecting "increased statutory mandatory minimum penalties for offenses pursuant to Section 6481 of the Anti-Drug Abuse Act of 1988"); Amend. 556 (reflecting increases in maximum penalties for offenses involving trafficking and simple possession of flunitrazepam); Amend. 595 (reflecting statutory changes to methamphetamine quantities triggering mandatory minimum sentences); Amend. 598 (reflecting changes to mandatory minimum sentences in 18 U.S.C. § 924(c)); Amend. 600 (same); Amend. 642 (same); Amend. 652 (reflecting increase in statutory maximum sentence for involuntary manslaughter); Amend. 653 (increasing base offense level for fraud offense to reflect the increased statutory maximum sentences made by the *Sarbanes-Oxley Act of 2002*, Pub. L. 107–204, 116 Stat. 745 (2002)).

A number of congressional directives to the Commission, enacted subsequent to the Act, also evidence

continuing legislative intent that the Guidelines work within the available statutory penalty parameters. *See, e.g.*, *Identity Theft and Assumption Deterrence Act of 1998*, Pub. L. 105-318, § 4, 112 Stat. 3009 (1998) (amending 18 U.S.C. § 1028) (requiring the Commission to consider, for certain identity theft offenders, the extent to which the guideline sentences for the offense have been constrained by previously existing statutory maximum penalties); *Wireless Telephone Protection Act*, Pub. L. 105-172, § 2(e), 112 Stat. 55 (1998) (amending 18 U.S.C. § 1029) (directing the Commission to review and amend the sentencing guidelines to address offenses involving the cloning of a wireless telephone).[10]

The consistently expressed legislative and Commission intent is that the Guidelines structure and constrain judicial sentencing discretion within legislated penalty parameters. Were *Blakely* to be extended to apply to the Guidelines such that the penalties therein expressed are deemed statutory maxima, the Guidelines would have been elevated to a legal status clearly contrary to that intent.

B. The Court Has Recognized That The Guidelines Do Not Establish The "Statutory Maximum" For Any Criminal Offense

When this Court first upheld the constitutionality of the Guidelines in *Mistretta*, it repeatedly recognized that the Commission lacks the authority to prescribe any statutory maxima for federal crimes. *See Mistretta*, 488 U.S. at 391, 396. The Court further explained that "the Sentencing

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[10] The only Guideline provision that allows the court to "impose a sentence without regard to any statutory minimum sentence" requires a defendant to meet criteria set forth in 18 U.S.C. § 3553 (f)(1)-(5). *See Guidelines Manual* § 5C1.2 (2003).

Commission is devoted exclusively to the development of rules to *rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch.*" *Id.* at 407 (emphasis added). The jury traditionally had no role at the sentencing phase of the criminal case. Thus, the Guidelines do not "infringe[] upon the province of the jury," any more than the post-verdict or post-plea judicial factfinding this Court finds constitutional in indeterminate schemes. *Blakely*, 124 S.Ct. at 2540.

This Court has long recognized the differences between the sentencing ranges imposed by the Guidelines and those imposed statutorily by Congress. For example, in *Stinson v. United States*, 508 U.S. 36 (1993), the Court equated the Guidelines with rules adopted by federal agencies, stating that the "Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rule-making, and through the informal rule-making procedures in 5 U.S.C. § 553." *Stinson*, 508 U.S. at 45 (internal citations omitted). Citing precedent that an agency's interpretation of its own regulations must be given controlling weight, so long as it does not violate the Constitution or a *federal statute* and is not plainly erroneous or inconsistent with the regulation, this Court upheld as binding the commentary that a felon-in-possession offense does not constitute a crime of violence for purposes of *Guideline Manual* § 4B1.2. *Id.* at 45-47 (emphasis added).[11]

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[11] This Court has further recognized the distinction between statutory maxima established by Congress and the Guidelines in Rule 11 of the Federal Rules of Criminal Procedure. Indeed, since 1974, Rule 11 has expressly mandated that prior to acceptance of a guilty plea, a court must inform and be assured that a defendant understands the maximum possible sentence of imprisonment and any mandatory minimum sentence. *See* Fed. R. Crim. P.

Three years later, in *Neal v. United States*, 516 U.S. 284 (1996), this Court reiterated the distinction between the Guidelines and statutes, indicating that Congress' pronouncements trump the Commission's. Specifically, the Court considered whether the revised system for determining

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11(b)(1)(H), 11(b)(1)(I); Fed. R. Crim. P. 11 advisory committee's note (concerning 1974 amendments). The Advisory Committee notes indicate that these changes were made "to insure that a defendant knows what minimum sentence the judge **must** impose and what maximum sentence the judge **may** impose." *See* Fed. R. Crim. P. 11 advisory committee's note (concerning 1974 amendments) (emphasis in original). As the Committee recognized, the minimum and maximum sentence "is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty." *Id.* Pursuant to a provision adopted in 1989, the Rule now also instructs the court to inform a defendant of its obligation to apply the Guidelines, including its discretion to depart under some circumstances. *See* Fed. R. Crim. P. 11(b)(1)(M). However, in contrast to the 1974 amendment requiring explicit notice of the maximum penalty authorized by statute, "the amendment does not require the court to specify which guidelines will be important or which grounds for departure might prove to be significant" at the time of the plea because "it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts." *See* Fed. R. Crim. P. 11 advisory committee's note (concerning 1989 amendment). Thus, under current federal rules, at the time of entry of a guilty plea, a defendant need only be informed of the maximum and minimum statutory penalties adopted by Congress. The defendant need not be told of any possible Guidelines calculation. Indeed, the Rule only requires that the defendant be told that the Guidelines exist and that the court is authorized to depart from the Guidelines calculation subsequently determined.

LSD amounts under the Guidelines required reconsideration of the method used to determine statutory minimum sentences announced in *Chapman v. United States*, 500 U.S. 453 (1991). Shortly after the Court announced its decision in *Chapman*, the Commission revised the method of calculating the weight of LSD in the Guidelines, and used a different method from the one required by *Chapman*. *See Guidelines Manual*, App. C., Amend. 488 (1995). The Petitioner urged the Court to hold that the Commission's method of calculating the weight of LSD was the appropriate method, but the Court rejected this position. *Neal*, 516 U.S. at 289-90. In so doing, the Court stated that "[w]hile acknowledging that the Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts, we conclude that the Commission's choice of an alternative methodology for weighing LSD does not alter our interpretation of the statute in *Chapman*." *Id.* at 290. Thus, the Court reaffirmed the principle that the Guidelines must defer to legislative dictates.

Similarly, in *United States v. LaBonte*, 520 U.S. 751 (1997), this Court once again made clear that the Guidelines must give way to congressional pronouncements. In that case, this Court considered the meaning of the phrase "maximum term authorized" used in 28 U.S.C. § 994(h). The Commission had determined that the maximum term available for the offense of conviction did not include any applicable statutory sentencing enhancements. *Id.* at 752-53. The Court rejected this view. Although recognizing the Commission's broad discretion to create guidelines, the Court held that such discretion "must bow to the specific directives of Congress" and "if the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way." *Id.* at 757. The Court went on to state "[w]e conclude that the Commission's interpretation is

inconsistent with § 994(h)'s plain language, and therefore hold that 'maximum term authorized' must be read to include all applicable statutory sentencing enhancements." *Id.* at 753. "Accordingly, the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by *statute*." *Id.* at 758 (emphasis added). This holding supports a determination that the prescribed statutory maximum for federal crimes is also the highest or greatest allowed by the statute of conviction, not the applicable guideline range.

Further support for the Commission's understanding of the limitations on its authority to impact statutory penalties can be derived from this Court's holding in *United States v. Melendez*, 518 US. 120, 122 (1996). There, the Court held that a motion by the government for a departure from the applicable guidelines range pursuant to *Guidelines Manual* § 5K1.1 does not also authorize a departure from the statutory minimum mandatory sentence absent a government request for such a departure. Implicit in the Court's holding is a distinction between statutes (in this instance, 18 U.S.C. § 3553(e)) and the Guidelines. Once again, this underscores the principle that statutes trump the Guidelines.

C. Considerable Precedent Supports The View That Factfinding Under The Guidelines Does Not Violate The Sixth Amendment Because The Guidelines Do Not Set Statutory Maxima

To conclude that factfinding under the guidelines violates the Sixth Amendment, the Court would have to

overrule or distinguish considerable recent precedent.[12] Perhaps most notably, the Court would have to overrule or substantially limit *Edwards v. United States*, 523 U.S. 511 (1998). In *Edwards*, the government charged petitioners with violating 21 U.S.C. §§ 841 and 846 by conspiring "to possess with intent to distribute . . . mixtures containing" two controlled substances, namely, "cocaine . . . and cocaine base" (i.e., "crack"). *Edwards*, 523 U.S. at 512-13. After the district court judge instructed the jury that "the government must prove that the conspiracy . . . involved measurable amounts of cocaine or cocaine base," the jury returned a general verdict of guilty." Following the jury verdict, the judge imposed sentences based on his finding that each petitioner's illegal conduct had involved both

[12] *See, e.g., United States v. Watts*, 519 U.S. 148, 152 (1997) (holding that judge may enhance a defendant's sentence based on "facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted") (citing *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.); *Witte v. United States*, 515 U.S. 389, 403 (1995)) (allowing use of relevant conduct, stating that the "relevant conduct provisions of the Sentencing Guidelines, like their criminal history counterparts and the recidivism statutes discussed above, are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity"); *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (upholding court's determination that defendant obstructed justice pursuant to *Guideline Manual* § 3C1.1 by committing perjury at trial and rejecting "respondent's argument that the § 3C1.1 sentence enhancement advances only 'the impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution.'").

cocaine *and* crack. *Id.* at 513. On appeal to the Seventh Circuit Court of Appeals, the petitioners argued that the word "'or' in the judge's instruction meant that the judge had to assume that the conspiracy involved only cocaine" because the Guidelines treat that drug more leniently than crack. *Id.* The Seventh Circuit Court of Appeals affirmed, and the petitioners sought review in this Court.

Before this Court, petitioners argued that their "Fifth and Sixth Amendment rights to a jury determination of all the essential elements of the offense is defeated in this case unless the Petitioners are sentenced on the agreement carrying the lesser punishment." *Edwards Brief for Petitioners*, 1997 WL 793079 at *30 (Dec. 17, 1997). However, in a unanimous opinion affirming the Seventh Circuit, the Court squarely *rejected* this argument because the petitioners' sentence did not exceed the maximum sentence as set by Congress. *Edwards*, 523 U.S. at 515 ("Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine--only conspiracy").

Moreover, according to the Court, traditional sentencing factors, like those contained in the Guidelines, are not subject to Sixth Amendment constraints. In *Harris v. United States*, 536 U.S. 545 (2002), for example, the Court explained that "not all facts affecting the defendant's punishment are elements . . . [and] these facts, sometimes referred to as sentencing factors, [do not need] to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt." *Harris*, 536 U.S. at 549-50. In light of this principle, the Court distinguished the factual findings at issue in *Apprendi* with those at issue in *Harris*, noting that "any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would

have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights." *Id.* at 557-58 (emphasis added). Then, citing to *Apprendi*, 530 U.S. at 498, the Court noted that the "Fifth and Sixth Amendments ensure that the defendant 'will never get more punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that." *Id.* at 566. Turning its attention to the statute at issue, the Court concluded that it was constitutional and did not evade the requirements of the Fifth and Sixth Amendment because "Congress 'simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor.'" *Id.* at 559, citing *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986). "That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Id.*

This Court has always recognized that the Guidelines, like the mandatory minimum at issue in *Harris*, constrain, and do not extend, the court's authority. Because the Guidelines do not "alter the *congressionally prescribed* range of penalties to which a criminal defendant is exposed," *Jones v. United States*, 526 U.S. 227, 253 (1999) (Scalia, J., concurring) (emphasis added), the Guidelines do not implicate the Sixth Amendment concerns raised in *Blakely*.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the lower courts and hold that the Guidelines do not prescribe statutory maxima, and a Guideline sentence involving judicial factfinding therefore does not violate the Sixth Amendment to the United States Constitution.

Respectfully submitted,

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